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BRAY V. RUSSELL:¹ THE CONSTITUTIONALITY OF THE “BAD TIME” STATUTE²

“It is a ‘bad time’ indeed when our society makes the turn in the road where we decided that prison guards shall be given the authority to impose prison time upon the prisoners under their control.”³ “The disciplinary system should no longer be the prison as the Leviathan but rather one that permits the maximum degree of liberty that is compatible with the fact of confinement.”⁴

I. INTRODUCTION

“Once the prison gate closes, one enters an authoritarian ‘total institution.’”⁵ Prison inmates are involuntary residents who comprise a

1. *State ex rel. Bray v. Russel*, 729 N.E.2d 359 (Ohio 2000). The *Bray* court found that Ohio Revised Code § 2967.11, a statute which allows executive branch officials to try, convict, and add bad time to prison terms for criminal violations that occur during the course of a prisoner’s incarceration, is unconstitutional as it violates the constitutional doctrine of separation of powers. *Id.* at 362.

2. OHIO REV. CODE ANN. § 2967.11(B) (West 2000) states in pertinent part:

As part of prisoner’s sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner’s stated prison term for a period of fifteen, thirty, sixty, or ninety days in accordance with this section. The parole board may not extend a prisoner’s stated prison term for a period longer than one-half of the stated prison terms’ duration for all violations occurring during the course of the prisoner’s stated prison term, including violations occurring while the offender is serving extended time under this section or serving a prison term imposed for a failure to meet the conditions of a post-release control sanction imposed under section 2967.28 of the Revised Code. If a prisoner’s stated prison term is extended under this section, the time by which it is so extended shall be referred to as “bad time.”

§ 2967.11(B).

3. *White v. Konteh*, No. 99-T-0020, 1999 WL 587976 at * 6 (Ohio App. 11th Dist. Mar. 23, 1999). The decision in *White* was later affirmed by *State ex rel. Bray v. Russel*, 729 N.E.2d 359 (Ohio 2000).

4. James E. Robertson, “*Catchall*” *Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 172 (1994) [hereinafter Robertson, *Catchall*]. Robertson urges courts to be suspect of prison rules that constitute an exaggerated response to institutional concerns because offenders are sent to prison as punishment, not for punishment, and the conditions of confinement, including prison rules and regulations should be consistent with this distinction. *Id.*

5. James E. Robertson, *The Decline of Negative Implication Jurisprudence: Procedural Fairness in Prison Discipline After Sandin v. Conner*, 32 TULSA L.J. 39, 39 (1996) [hereinafter

subculture in opposition to their keepers.⁶ Many inmates are chronic lawbreakers, not only outside the prison gates, but inside as well.⁷

Disciplinary tribunals enforce official rules of conduct that regulate inmates' lives.⁸ These tribunals have performed the task of hearing and deciding disciplinary charges.⁹ As a result, the prison staff can lawfully deprive inmates of constitutional liberties.¹⁰ Although the Supreme Court has acknowledged that the disciplinary tribunals staffed by the prison's own officers face "obvious pressure to resolve a disciplinary dispute in favor of the institution,"¹¹ the Court has not found their use unconstitutional.¹² In *Bray v. Russell*, the Supreme Court of Ohio

Robertson, *Decline*]. Robertson defines "total institutions" as a place where all aspects of life are conducted in the same place and under the same authority, and where activities which are tightly scheduled are carried on in the company of a large group of others who are treated alike and are required to do the same thing, all in an effort to fulfill the official aims of the institution. *Id.* at 39 n.1.

6. John Irwin & Donald R. Cressey, *Thieves, Convicts, and the Inmate Culture*, 10 SOC. PROBS. 142, 142-55 (1962). See also HOWARD S. BECKER, *SOCIAL PROBLEMS: A MODERN APPROACH* 271-76 (1967) (describing a number of studies on the extent inmates' form a society of their own characterized by its own values and social orders).

7. Robertson, *Catchall*, *supra* note 4, at 154 (1994). Robertson explains that prisons subject inmates to a number of disciplinary rules, some of which mirror the criminal law, and others that punish conduct that would otherwise be innocent but for the custodial nature of the prison. *Id.* at 153. He further explains that the disciplinary rules have a 'catchall' quality because they give a blanket authority to the prison staff which deny inmates fair warning of punishable behavior as well as provide prison staff with wide discretion in determining whether an inmate's conduct is permissible or punishable. *Id.*

8. James E. Robertson, *Impartiality and Prison Disciplinary Tribunals*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 326-29 (1991) [hereinafter Robertson, *Impartiality*]. Robertson explains the three approaches to staffing disciplinary tribunals. *Id.* Under the historical approach custody officers adjudicated charges; a more recent approach utilizes both custody and treatment personnel appointed by the warden and; a third approach consists of a single hearing officer supervised by the commissioner of corrections instead of the warden. *Id.*

9. *Id.* at 302.

10. See Robertson, *Decline*, *supra* note 4, at 40. Robertson explains that while prison staff can lawfully deprive inmates of constitutional liberties, namely, those granted under the Due Process Clause of the Fourteenth Amendment, such deprivation must be preceded by "some kind of hearing." *Id.* Inmates commonly refer to the disciplinary proceedings as "kangaroo courts" because an inmate is quickly in and out without any real justice taking place. WILLIAM K. BENTLEY & JAMES M. CORBETT, *PRISON SLANG* 11 (1992).

11. *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985). The court emphasized that members of disciplinary committees are employees of the Bureau of Prisons who are directly subordinate to the warden who reviews their decision. *Id.* The members also work with the fellow employee who made the charge against the inmate upon whom they are about to judge. *Id.* In addition, the credibility determination made by the disciplinary committee is often one between a co-worker and an inmate. *Id.*

12. *Wolff v. McDonnell*, 418 U.S. 539, 570-71 (1974). The Supreme Court held that the adjustment committee in a Nebraska prison complex that conducted hearings to determine whether to revoke good time was *sufficiently impartial* and thus did not violate the Due Process Clause of the Constitution. *Id.* at 571 (emphasis added).

decided whether Ohio Revised Code §2967.11, referred to as the “bad time” statute, is a violation of an inmate’s constitutional rights.¹³ More specifically, the court was asked to decide whether the statute allowed for punishment without due process of law, deprived prisoners of equal protection of the law, and violated the doctrine of separation of powers.¹⁴ The Court recognized that the bad time statute violates the doctrine of separation of powers, and accordingly, the Court did not need to address the equal protection or due process issues.¹⁵

This Note analyzes the Court’s decision in *Bray*.¹⁶ Part II presents an overview of sentencing systems in the United States, the bad time penalty,¹⁷ and a brief background of the doctrine of separation of powers.¹⁸ Part III presents the facts, procedural history, and holding of *Bray*.¹⁹ Part IV analyzes the Court’s holding pursuant to the Due Process Clause rather than the doctrine of separation of powers.²⁰ This Note concludes that although the bad time statute is unconstitutional as a violation of the doctrine of separation of powers, the court could have alternatively decided that the bad time statute also violates the Due Process Clause.²¹

II. BACKGROUND

A. An Overview of Sentencing Systems

Generally, two sentencing schemes exist in the United States: an indeterminate system and a determinate system.²² In an indeterminate system, the legislature sets a range of punishment for crimes, and both the judge and the parole board exercise discretion on how long the offender’s sentence will be.²³ In a determinate sentencing system, the

13. *Bray*, 729 N.E.2d at 361.

14. *Id.* at 361.

15. *Id.*

16. *See infra* notes 95-141 and accompanying text.

17. *See infra* notes 22-59 and accompanying text.

18. *See infra* notes 60-74 and accompanying text.

19. *See infra* notes 75-94 and accompanying text.

20. *See infra* notes 95-129 and accompanying text.

21. *See infra* notes 142-44 and accompanying text.

22. Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 573 (1994). Palacios explains that although no “typical” sentencing and parole system exists, general patterns can be distinguished and are classified as either determinate or indeterminate. *Id.* at 573.

23. *Id.* If the judge decides to incarcerate an offender, rather than exercise a non-custodial sanction, the term of incarceration is expressed as a range of time. *Id.* When an offender requests

judge, alone, decides whether to incarcerate the offender and exactly how long the offender should serve.²⁴ This system allows offenders to know at sentencing the amount of time they will serve in prison.²⁵

In the past, Ohio's courts exercised an indeterminate sentencing scheme that incorporated the theory of "good time."²⁶ After Amended Substitute Senate Bill No. 2 was enacted in 1995,²⁷ Ohio abolished the indeterminate sentencing scheme, and adopted a determinate sentencing scheme that abolished good time altogether.²⁸ As a result, Ohio adopted a bad time theory of determinate sentencing.²⁹

B. The "Bad Time Penalty": Ohio Revised Code §2967.11³⁰

Ohio Revised Code §2967.11 (R.C. 2967.11) created a procedure by which the Rules Infraction Board³¹ of Ohio state prisons could punish an offender by extending an inmate's prison term up to an additional ninety days for committing a "violation"³² while incarcerated.³³ This

an early release, the release may be granted at the discretion of the parole board. *Id.* If the parole board grants the release, the inmate is placed on parole. *Id.* The article defines parole as a period of supervision under the rules contained in a parole agreement. *Id.* If a parolee violates the terms in the agreement, he or she may be returned to prison to serve all or part of the remaining sentence. *Id.*

24. *Id.* at 574.

25. *Id.* In the determinate sentencing scheme parole is eliminated altogether. However, the sentence may be reduced for good behavior, generally referred to as "good time"

26. See former OHIO REV. CODE ANN. § 2967.13 and § 2967.19, repealed July 1, 1996. See also James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221 (1982). Professor Jacobs explained that there are three types of good time: "statutory good time" rewards prisoners who conform with prison rules and regulations; "meritorious good time" rewards participation in prison programs and industries, and; "extraordinary good time" rewards prisoners who give blood, serve as experimental medical subjects, or perform such outstanding services as saving the life of a staff member or fellow prisoner. *Id.* He further explains that under a determinate sentencing scheme good time credits accelerate the date of release whereas under an indeterminate sentencing scheme, good time is subtracted from the minimum as well as the maximum sentence, which accelerates parole eligibility. *Id.* at 222-24.

27. Am. Sub. S.B. No. 2, 121st Gen. Assem., at 439 (Ohio 1995). After the passage of Senate Bill 2, Ohio's new law ends any involvement with the State Parole Board in modifying sentences. *Id.* Thus, inmates will serve at least 97% of the imposed sentence. See Reply Brief of Petitioner – Appellant Gary Bray at A-82, *Bray v. Russell*, 729 N.E.2d 359 (Ohio 2000) (No. CA98-06-068).

28. OHIO REV. CODE ANN. § 2967.11 (West 2000) effectively replaced the prior sentencing scheme, and incorporated "bad time" rather than "good time." § 2967.11.

29. See *infra* notes 33-59 and accompanying text.

30. See OHIO REV. CODE ANN. § 2967.11(B) (West 2000) see *supra* note 2 for the full text of the statute.

31. Ohio Prison Rule No. 5120-9-091(A)(4). This board is a panel that is designated to hear cases involving the possible imposition of bad time. *Id.* The panel is composed of three staff members selected by the warden specifically to hear allegations of bad time charges. *Id.*

32. OHIO REV. CODE ANN. § 2967.11(A) (West 2000) defines "violation" as an act that is a criminal offense under the law of this state or the United States, whether or not a person is prosecuted for the commission of the offense. § 2967.11(A).

sentencing scheme is called “bad time.”³⁴ It is critically important to understand that the sentencing scheme of “bad time” is inherently different from the sentencing scheme of good time.

Under the bad time statute, an inmate’s release at the end of a sentence is not contingent on any privilege granted by the state.³⁵ When the prison staff tries and convicts an inmate, a new term of incarceration is added on to the end of the maximum sentence already imposed.³⁶ In contrast, good time is a state-created liberty interest.³⁷ When an inmate loses good time credit for a disciplinary violation, the inmate is only losing the privilege of early release, a state-created privilege.³⁸

The bad time statute sets forth the procedure to impose an extended prison term.³⁹ First, when a prisoner allegedly commits a violation,⁴⁰ an officer investigates and reports his findings to the Rules Infraction Board.⁴¹ Next, the Board conducts a hearing to decide whether there is

33. OHIO REV. CODE ANN. § 2967.11(B) (West 2000) states that the board may extend the prison term for a period of fifteen, thirty, sixty or ninety days, but may not extend the term for a period longer than one-half of the stated prison term’s duration for all violations occurring during the course of the prisoner’s stated prison term. § 2967.11(B).

34. OHIO REV. CODE ANN. § 2929.01(B) (West 2000) states:

“Bad time” means the time by which the parole board administratively extends an offender’s stated prison term or terms pursuant to section 2967.11 of the Revised Code because the parole board finds by clear and convincing evidence that the offender, while serving the prison term or terms, committed an act that is a criminal offense under the law of this state or the United States, whether or not the offender is prosecuted for the commission of that act.

§ 2929.01(B).

35. Brief of Petitioner – Appellant Gary Bray at 11, State *ex rel.* Bray v. Russell, 729 N.E.2d 359 (Ohio 2000) (CA98-06-068).

36. *Id.*

37. *Id.* See Jacobs *supra* note 26. Ohio exercised a theory of “meritorious good time” in which prisoners could earn credit for participating in an education program, training or employment in industries and/or treatment for substance abuse. See also OHIO REV. CODE ANN. § 2967.193(A) (West 2000).

38. Brief of Petitioner – Appellant Gary Bray at 11, State *ex rel.* Bray v. Russell, 729 N.E.2d 359 (Ohio 2000) (CA 98-06-068).

39. See generally OHIO REV. CODE ANN. § 2967.11(C)-(H) (West 2000).

40. See OHIO REV. CODE ANN. § 2967.11(A) (West 2000) See *supra* note 32 for an explanation of the statute.

41. OHIO REV. CODE ANN. § 2967.11(C) (West 2000) states in pertinent part:

When a prisoner in an institution is alleged by any person to have committed a violation . . . the appropriate official shall . . . investigate . . . and report . . . to the rules infraction board. [T]he rules infraction board . . . shall hold a hearing . . . to determine . . . whether there is evidence of a violation. At the hearing the accused prisoner shall have the right to testify and be assisted by a member of the staff . . . to assist the prisoner in presenting a defense. [T]he board shall report its finding to the head of the institution . . . it shall also include with its finding a recommendation regarding a period of time, as specified in division (B) of this section [2967.11]. . . .

§ 2967.11(A).

evidence of a violation, and reports its findings to the warden along with a recommendation on how long to extend the prison term.⁴²

At the hearing, the inmate may testify, and a member of the staff of the institution is designated to assist the prisoner in presenting a defense before the Board.⁴³ However, this “assistant” does not represent the inmate as would an attorney, thus any conversations with the assistant are not privileged.⁴⁴ After receiving the report, the warden decides if the report provides clear and convincing evidence that the prisoner committed a violation.⁴⁵ The warden then reports his findings to the Board and recommends how long to extend the inmate’s prison term.⁴⁶

Ultimately, the Board makes the final decision after reviewing the warden’s report.⁴⁷ If the Board agrees with the warden’s report, it then determines the length of the prison term to impose.⁴⁸ When the Board makes its decision, the inmate is not present, and the inmate does not have an opportunity to present evidence nor have knowledge of what other information the Board is considering.⁴⁹ If the board has not reached a decision before the inmate’s stated time for release, the warden may hold the prisoner for ten days beyond his lawful prison term.⁵⁰

42. § 2967.11(A).

43. *Id.*

44. Brief of Petitioner – Appellant Gary Bray 729 N.E.2d 359 (No. CA98-06-068) (this distinction is important as an inmate is not advised of his state and federal privilege against self-incrimination). *Id.* at 4.

45. OHIO REV. CODE ANN. § 2967.11(D) (West 2000) provides in pertinent part, If the head of the institution determines by clear and convincing evidence that the prisoner committed a violation and concludes that the prisoner’s stated prison term should be extended as a result of the violation, the head of the institution shall report the determination in a finding to the parole board

§ 2967.11(D).

46. § 2967.11(D).

47. OHIO REV. CODE ANN. § 2967.11(E) (West 2000) provides in pertinent part:

[A]fter receiving a report from the head of an institution . . . containing a finding and recommendation, the parole board shall review the findings of the rules infraction board and the head of the institution to determine whether there is clear and convincing evidence that the prisoner committed the violation and, if so, to determine whether the stated prison term should be extended and the length of time by which to extend it.

48. § 2967.11(E). The board determines the length of the additional term of imprisonment by considering the nature of the violation, other conduct of the prisoner while in prison, and any other evidence relevant to maintaining order in the institution. § 2967.11(E).

49. Brief of Petitioner – Appellant Gary Bray at 4, *Bray*, 729 N.E.2d 359 (No. CA98-06-068).

50. OHIO REV. CODE ANN. § 2967.11(F) (West 2000) provides in pertinent part, “If necessary, the accused prisoner may be held in the institution for not more than ten days after the end of the prisoner’s stated prison term pending review of the violation and a determination regarding an extension of the stated prison term.” § 2967.11(F).

C. *The Purpose of R.C. 2967.11*

A review of the bad time statute establishes that the purpose of bad time is to punish the offender.⁵¹ Although Ohio has no legislative history on this matter,⁵² legislative intent is to be construed by considering “the entire act and the surrounding circumstances attending its enactment.”⁵³ Bad time promotes retribution and deterrence, two aims of punishment for the violation of criminal offenses.⁵⁴ As further evidence of this purpose, the bad time statute states, in pertinent part, that, “as part of a prisoner’s sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner’s stated prison term.”⁵⁵

An important distinction between criminal punishment and administrative discipline is that criminal punishment is penal in nature whereas administrative discipline is regulatory in nature. Moreover, if a regulation is penal in nature, it gives rise not only to the doctrine of separation of powers but also to all the protections afforded to citizens under the Due Process Clause of the Fourteenth Amendment.⁵⁶ In *Kennedy v. Mendoza-Martinez*, the United States Supreme Court set forth seven factors with which to determine if a sanction is penal or regulatory.⁵⁷ Based on the factors set forth in *Mendoza-Martinez*, the bad time statute creates a sanction that is penal in nature rather than

51. See *infra* notes 54-59 and accompanying text.

52. *State v. Dickinson*, 275 N.E.2d 599, 600 (Ohio 1971). The court reasoned that because Ohio maintains no legislative history of statutes, we must look to the source of the statute, and to judicial pronouncements to determine the statutes’ meaning. *Id.*

53. *State ex rel. Mitman v. Board of County Comm’rs*, 113 N.E. 831, 834 (Ohio 1916).

54. See *A Plan for Felony Sentencing in Ohio: A Formal Report of the Ohio Criminal Sentencing Commission*, at 46 (July 1, 1993) (recognizing that prison officials need tools to deter misconduct).

55. See OHIO REV. CODE ANN. § 2967.11(B). See *supra* note 2 for the full text of the statute.

56. Thomas C. French, *Is it Punitive or is it Regulatory?* *United States v. Salerno*, 20 U. TOL. L. REV. 189, 214 (1988). In this note, French explains that the court analyzed the constitutionality of the Bail Reform Act. *Id.* One factor the court considered was whether the Act was regulatory or punitive in nature. *Id.* The court reasoned that if an act is punitive in nature, it violates substantive due process, and if the act is regulatory in nature, it is constitutionally permissible. *Id.* The analysis the court employed was to first examine the legislative intent behind the Act, then focused in part on the test set forth in *Kennedy v. Mendoza-Martinez*. *Id.*

57. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Kennedy* set forth the seven factors as follows: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id.*

regulatory.⁵⁸ Thus, offenders sentenced under the bad time statute are entitled to invoke all the protections afforded to them by the Due Process Clause.⁵⁹

D. Separation of Powers

“There is no liberty if the power of judging be not separated from the legislative and executive powers.”⁶⁰ The doctrine of separation of powers is a political theory that both the Framers of the United States Constitution and the Anti-Federalists regarded as an essential element in structuring the government.⁶¹ However, the Framers were not certain what exactly the doctrine required, and thus made no effort to adhere to it rigidly when they drafted the Constitution.⁶² Instead, the Framers assigned some functions that would appear to belong solely to one of the other branches in order to create a system of checks and balances.⁶³

58. *Cf. id.* (explaining that factors relevant to whether a statute is penal or regulatory in character include: (1) whether it has historically been regarded as punishment; (2) whether behavior to which it applies is already a crime; (3) whether the sanction involves an affirmative disability or restraint; and (4) whether the operation will promote traditional aims of punishment).

59. *See infra* notes 102-15 and accompanying text.

60. THE FEDERALIST NO. 47 (James Madison). Madison explains that when Montesquieu made this statement he did not mean that the departments ought to have no *partial agency* in, or no *control* over, the acts of each other. *Id.* Instead, Madison argues that Montesquieu meant that where the *whole* power of one department is exercised by the same hands that possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. *Id.* Madison stated that, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.” *Id.*

61. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-87 547-53 (1969). Wood explains that the Anti-Federalists lacked confidence in the “new” government because of the lack of constitutional checks. *Id.* at 548. Anti-federalists from various states emphasized that the three branches of government should be separate and distinct, arguing that this was a political fact so well established that it could not be questioned. *Id.*

62. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212-24 (1989). Casper explains that although the constitutional text implies the notion of distinct branches, it did not invoke the separation of powers as a principle. *Id.* at 221; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 477-81 (1989). Gwyn explains the uncertainty among the Framers regarding the very nature of the legislative and executive power and how the powers should be allocated institutionally. *Id.* at 480.

63. The phrase “separation of powers” does not appear in the text of the United States Constitution. Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990). The vestiture clauses assign legislative, executive, and judicial powers to Congress; U.S. CONST. art. I, § 1, the President; U.S. CONST. art. II, § 1; and the federal courts, U.S. CONST. art. III, § 1. However, the Constitution specifically grants each branch certain powers that seem to fall within the scope of the authority of

The doctrine of separation of powers is also a “bedrock principle to the constitutions of each of the fifty states.”⁶⁴ Most state constitutions have expressly acknowledged separation of powers principles within their constitutional texts.⁶⁵ Cases involving separation of powers issues have increased in the last decade,⁶⁶ and a debate has arisen concerning the distinction between a formalistic and functionalistic approach to resolving separation of powers questions.⁶⁷ Those who adopt a formalist approach emphasize keeping the three branches of government as distinct as possible.⁶⁸ Formalists argue that the key to separation of powers disputes lies in determining whether to characterize the challenged action as lawmaking, enforcing, or interpreting the law.⁶⁹

one of the other branches. For instance, the House of Representatives has “the sole Power of Impeachment;” U.S. CONST. art. I, § 2, cl. 5; and the Senate has the “sole power to try all Impeachments.” U.S. CONST. art. I, § 3 cl. 6.

64. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190 (1999). There are three basic approaches in which state constitutions express separation of powers principles. *Id.* First, some state constitutions contain a strict separation of powers clause. *Id.* This approach is found in an overwhelming majority of modern state constitutions, and is strict to the extent that it not only divides power between the various branches but also instructs that one branch is not to exercise the powers of any of the others. *Id.* Other states incorporate a general separation of powers clause. *Id.* A general separation of powers clause divides the powers of government into three branches without prohibiting one branch from exercising the power of another. *Id.* The remaining states, including Ohio, have no explicit separation of powers clause in the text of their constitutions. *Id.*

65. *Id.* See also Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court’s Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 588 (1990). Schwartz explains that in May 1776, before formal independence was proclaimed, the Second Continental Congress adopted a resolution that urged the colonies to set up their own governments. *Id.* Virginia was the first state to adopt a Constitution and Declaration of Rights. *Id.* The Virginia Constitution included a provision purporting that the legislative and executive powers of the state be separate and distinct from the judiciary. *Id.*

66. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988) (discussing whether congressional efforts to streamline the adjudicative process, congressional endeavors to retain some control over Congress’s broad delegations of authority to the executive branch, and increased sensitivities to perceived separation of powers infractions have contributed to the growth of litigation).

67. See *infra* notes 68-74 and accompanying text.

68. Krent, *supra* note 66, at 1254 (explaining that formalists base their approach on Montesquieu’s model, arguing how the challenged action should be characterized, whereas the functionalists refuse to rely on the form of the particular action). This approach has also been referred to as the “ex ante argument.” See George Anhang, *Separation of Powers and the Rule of Law: On the Role of Judicial Restraint in “Secur[ing] the Blessings of Liberty,”* 24 AKRON L. REV. 211, 212 (1990) (explaining that “ex ante” arguments attempt to justify the division of government power and responsibility into three categories with separate and distinct functions: (1) an executive; (2) a legislative; and (3) a judiciary).

69. Krent, *supra* note 66, at 1254 (explaining that actions characterized as lawmaking should remain in the province of the legislative; actions characterized as enforcing the law should remain the prerogative of the executive branch; and actions interpreting the law should fall within the domain of the judiciary).

In contrast, those who adhere to a functionalist view of separation of powers argue that it is impossible to distinguish the branches based upon the type of acts they perform.⁷⁰ In addition, functionalists argue that each branch acts in a number of ways when making, interpreting, and applying rules in many contexts.⁷¹ Thus, as long as the power assumed by one branch does not impermissibly intrude into the core function that the Framers allocated to another branch, the action should be sustained.⁷²

Because Ohio has no explicit separation of powers clause in its constitution, Ohio courts have adopted both views in various situations. In *Zanesville v. Zanesville Tel. & Tel. Co.*, the Court adopted a formalist approach, holding that “any encroachment by one [branch] upon the other is a step in the direction of arbitrary power.”⁷³ In contrast, in *Plain Dealer Publishing Co. v. Cleveland*, the Court determined that the separation of powers doctrine “applies only when there is some interference with another governmental branch.”⁷⁴

70. *Id.* at 1254-55 (explaining that functionalists believe it impossible to distinguish the branches based on the type of acts they perform, and instead ask whether the function exercised by one branch impermissibly intrudes into the “core function or domain of the other branch”). This view has also been referred to as the “ex post argument.” Anhang, *supra* note 63, at 213 (explaining that “ex post” arguments are about how the relationship between the judiciary, executive, and legislature should be organized, and attempt to justify degrees of independence of each of the three branches).

71. Krent, *supra* note 66, at 1255.

72. *Id.*

73. *City of Zanesville v. Zanesville Tel. & Tel. Co.* 59 N.E. 109, 110 (Ohio 1900). The court in *Zanesville* decided whether a statute that required probate courts to determine the mode in which telegraph and telephone companies may use streets and alleys (if the mode of use could not be agreed upon between municipal authorities) was legislative or administrative rather than judicial in character. *Id.* at 109. The court held that the statute invokes a power on the probate court that is legislative in nature, thus finding the statute in violation of separation of powers. *Id.*

74. *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 661 N.E.2d 187, 193 (Ohio 1996). In *Plain Dealer*, the Plain Dealer newspaper filed a writ of mandamus to compel the city to disclose the resumes of applicants for police chief pursuant to the Ohio Public Records Act. *Id.* at 192. The city contended that the Act violated separation of powers by infringing on the mayor’s executive authority to appoint a police chief. *Id.* The court held that because the mayor was not part of the executive branch of state government, the Act did not violate separation of powers. *Id.* The court reasoned that even if the mayor was part of the executive branch, the doctrine of separation of powers applies only where there is some interference with another governmental branch, and that disclosure of police chief applicants’ resumes does not unconstitutionally interfere with the mayors’ ability to select the best qualified candidate. *Id.* at 193. *See also* *State v. Hochhausler*, 668 N.E.2d 457, 464 (Ohio 1996) (holding that a statute violated the separation of powers because the Act “improperly interfered” with the exercise of the court’s functions).

III. STATEMENT OF THE CASE

This Note involves three factually similar cases,⁷⁵ which the Court consolidated sua sponte.⁷⁶ In all three cases, pursuant to Ohio Revised Code §2967.11, an administrative extension was added to the defendants' original prison terms for offenses committed during their incarceration.⁷⁷ All three prisoners subsequently filed writs of habeas corpus.⁷⁸ Although the Court only tried Bray's case, the judgment applied to White and Haddad as well.

A. Facts and Procedural History

In 1997, Gary Bray was charged with and convicted of drug possession, and the court sentenced him to an eight-month prison term.⁷⁹ While Bray was serving his sentence, he allegedly assaulted a prison

75. *Bray*, 717 N.E.2d 344; *Haddad v. Russell*, 717 N.E.2d 344 (Ohio 1999); *White v. Konteh*, 709 N.E.2d 850 (Ohio 1999).

In *White v. Konteh*, Samuel White was charged and convicted of receiving stolen property and sentenced to a definite term of sixteen-months in prison. *White*, 709 N.E.2d at 850. Six months prior to White's scheduled release he allegedly committed an assault. *Id.* The charge was heard by the Noble Correctional Institution's Rules Infraction Board, which found White guilty of the charge and recommended he serve a thirty-day bad time penalty upon the completion of his original sentence. *Id.* A few months later, White allegedly committed another assault, and the Rules Infraction Board imposed an additional ninety-day bad time penalty. *Id.* Following the imposition of the bad time sentence, White was transferred to the Trumbull County Correctional Institution. *Id.* White filed a writ of habeas corpus in the Court of Appeals, Trumbull County against the warden alleging that his continued incarceration was unlawful, as it violated his constitutional right to due process. *Id.* White's writ was granted by the court of appeals, and the state of Ohio appealed;

In *Haddad v. Russell*, Richard Haddad was charged and convicted of attempted aggravated assault, and sentenced to a nine-month prison term. *Haddad*, 717 N.E.2d at 344. One month before his scheduled release, Haddad allegedly committed an assault. *Id.* The Ohio Parole Board imposed a ninety-day bad time penalty on his original sentence pursuant to Ohio Revised Code 2967.11(B). *Id.* Haddad filed an instant petition for a writ of habeas corpus in the Supreme Court of Ohio. *Id.*

76. BLACK'S LAW DICTIONARY 308 (6th ed. 1990). The cases this Note involves were consolidated sua sponte. BLACK'S defines "consolidation of actions" as the act or process of uniting several actions into one trial and judgment, by order of a court, where all the actions are between the same parties, pending in the same court, and involving substantially the same subject matter, issues and defenses; or the court may order that one of the actions be tried and the others decided without a trial according to the judgment in the one selected and; "sua sponte" is defined as of his or her own will or motion; voluntarily; without prompting or suggestion. *Id.* at 1424.

77. See OHIO REV. CODE ANN. § 2967.11 (West 2000), *supra* note 2.

78. The writ of habeas corpus is a "remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction." *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). In *Preiser*, the court found that a habeas corpus proceeding was a proper method to seek restoration of prisoners' good-conduct time credits. *Id.* at 487-88.

79. *Bray*, 729 N.E.2d at 360.

guard in violation of Ohio Revised Code §2903.13.⁸⁰ As a result, the Rules Infraction Board imposed a ninety-day bad time penalty under Ohio Revised Code §2967.11 extending Bray's original eight-month sentence.⁸¹

Bray's original sentence for drug possession expired on June 5, 1998.⁸² After serving one week of bad time, Bray filed a writ of habeas corpus in the Court of Appeals of Warren County, claiming that the Warden, Harry Russell, was unlawfully restraining him.⁸³ Bray further argued that Ohio Revised Code §2967.11 was unconstitutional on its face because it violated due process, equal protection, and separation of powers.⁸⁴

Bray's Complaint in Writ of Habeas Corpus was still pending when he completed his ninety-day bad time penalty sentence, and the warden moved to have the case dismissed as moot.⁸⁵ The Court of Appeals denied the warden's motion because the issues Bray raised were capable of repetition, however, the court rejected each of Bray's constitutional challenges.⁸⁶ Bray then appealed as of right.⁸⁷

80. OHIO REV. CODE ANN. § 2903.13 (West 2000) provides in pertinent part:

(A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn. (B) No person shall recklessly cause serious harm to another or to another's unborn. (C) Whoever violates this section is guilty of assault . . . (2) If the offense is committed in any of the following circumstances, assault is a felony in the fifth degree: (a) The offense occurs in or on the grounds of a state correctional institution or an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction . . . and the offense is committed by a person incarcerated in the state correctional institution. . . .

§ 2903.13.

81. See *supra* note 2.

82. *Bray*, 729 N.E.2d at 360. See generally Appellant's Brief, *Bray*, 729 N.E.2d 359 (No. CA98-06-068) Bray argued that R.C. § 2967.11 was unconstitutional for three reasons: (1) the statute allows for punishment without due process of law because it fails to provide an inmate with counsel, burden of proof beyond a reasonable doubt, and a public jury trial; (2) the statute violated the doctrine of separation of powers because the establishment of an administrative mechanism to investigate, prosecute, and convict inmate offenders of violations of law within a prison rather than a court of law, is an illegal intrusion into the domain of the judiciary, and; (3) the statute deprived Bray equal protection of the law because the statute permits the state to incarcerate Bray without allowing him to exercise his fundamental rights. *Id.*

83. *Bray*, 729 N.E.2d at 360.

84. *Id.*

85. *Id.*

86. *Id.* See also Appellant's Brief at 13, *Bray*, 729 N.E.2d 359 (No. CA98-06-068). First, Bray argued that R.C. § 2967.11 was unconstitutional because it allowed for punishment without due process of law because it denied prisoners a right to counsel, and a right to a public jury trial, and required only a clear and convincing standard of proof, rather than proof beyond a reasonable doubt. *Id.* at 13-17. Second, Bray argued that the statute was unconstitutional because it violated the doctrine of separation of powers arguing that by establishing an administrative mechanism to investigate, prosecute, and convict inmate offenders of violations of the law within a prison rather

B. Reasoning of the Court

The Supreme Court of Ohio held that the bad time statute was unconstitutional because it violated the doctrine of separation of powers.⁸⁸ Relying on its holding in *Zanesville v. Zanesville Tel. & Tel. Co.*,⁸⁹ the Court adopted a formalistic approach to resolve the separation of powers question and reasoned that, trying, convicting, and sentencing inmates for crimes committed while in prison is not an appropriate exercise of executive power.⁹⁰

In a strong dissent, Justice Cook rejected the Court's adoption of the formalistic approach to the separation of powers issue.⁹¹ Instead, Justice Cook asserted that because the premise of "bad time" is part of the original judicially-imposed sentence, its administration by the executive branch presents no separation of powers issue.⁹² Justice Cook relied on the holding in *Nixon v. Administrator of General Services*,⁹³ a

than in a court of law was an illegal intrusion into the domain of the judiciary. *Id.* at 18. Lastly, Bray argued that the statute deprived Bray of equal protection of the law because when the statute permits the state to incarcerate Bray without allowing him to exercise his fundamental rights, Bray and other prisoners are denied equal protection of the law under the state and federal constitutions. *Id.* at 25.

87. BLACKS LAW DICTIONARY 96 (6th ed. 1990) (explaining within the definition of "appeal" that an appeal may be as of right, such as from the trial court to an intermediate appellate court, or only at the discretion of the appellate court, such as by writ of certiorari to the U.S. Supreme Court).

88. *Bray*, 729 N.E.2d at 362.

89. *Bray*, 729 N.E.2d at 361. See *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 109, 110 (Ohio 1900). In *Zanesville*, the court held that, "[T]he distribution of the powers of the government—legislative, executive, and judicial—among three co-ordinate branches, separate and independent of each other, is a fundamental feature of our system of constitutional government. . . and it is held that any encroachment by one upon the other is a step in the direction of arbitrary power" (emphasis added). *Id.* The *Bray* court explained that even though the judgment in *Zanesville* was reversed, the court still adhered to the principles set forth in the decision. *Bray*, 729 N.E.2d at 362.

90. See *supra* notes 73-74 and accompanying text. See also *Bray*, 729 N.E.2d at 361. The court rejected the state's argument that the doctrine of separation of powers "applies only when there is some interference with another governmental branch." *Id.* Furthermore, the court held that "the determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary." *Id.* at 362.

91. *Id.* at 362-63 (Ohio 2000) (Cook, J., dissenting) (expressing that the interconnected roles of the executive and judicial branches of the government under the "bad time" statute would not offend the separation of powers doctrine if it were analyzed according to federal jurisprudence on the subject because the United States Supreme Court has "squarely rejected" the "archaic view of the separation of the powers as requiring three airtight departments of government").

92. *Id.* Justice Cook agreed with the State's argument that "bad time" is part of the original judicially imposed sentence, rather than a whole new sentence added on to the original one. *Id.*

93. *Nixon v. Administrator of Gen. Servs.* 433 U.S. 425, 433 (1977). In *Nixon*, former President Nixon brought an action challenging the constitutionality of the Presidential Recordings and Materials Preservation Act. *Id.* The Court held that in determining whether legislation disrupts the proper balance between the coordinate branches of government by infringing on the powers

United States Supreme Court decision. Justice Cook reasoned that, when applying the *Nixon* approach to the separation of powers issue in *Bray*, the focus would be on the extent to which the “bad time” statute prevents the judicial branch from accomplishing its constitutionally assigned functions, rather than whether the Rules Infraction Board’s delegated function under the statute is “adjudicatory in nature.”⁹⁴

IV. ANALYSIS

This Note analyzes another argument that may have led the Court to the same decision. If the Ohio Supreme Court had addressed whether the “bad time” statute violated the Due Process Clause, the Court may have avoided the ongoing debate between the functionalistic and formalistic approaches to the doctrine of separation of powers.⁹⁵ If so, the Court clearly could have concluded that the “bad time” statute violated the Due Process Clause of the Fourteenth Amendment for a number of reasons.

The Court’s decision in *Bray* impliedly acknowledges the notion that prisoners are no longer “slaves of the state” who have no civil rights.⁹⁶ The decision in *Bray* is a step towards eliminating the “kangaroo courts”⁹⁷ within state correctional institutions. The Court wisely concluded that although prison discipline is an executive power, the bad time statute enabled the executive branch to exercise powers that are solely within the province of the judiciary.⁹⁸ The bad time statute enabled the executive branch to determine whether an inmate committed a crime, to prosecute the inmate for the crime, and to impose a sentence

allocated to the executive branch, the focus should be on *the extent to which it prevents the executive branch from accomplishing its constitutionally assigned function*. *Id.* at 443 (emphasis added). The Court reasoned that only where the potential for disruption is present should the Court determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Id.*

94. *Id.* at 363.

95. *Bray*, 729 N.E.2d at 361. The court found that Ohio Revised Code § 2967.11 violated the doctrine of separation of powers, and thus concluded that the court need not address whether the statute violated due process. *Id.*

96. Robertson, *Decline*, *supra* note 5, at 39. Prior to the twentieth century courts regarded prisoners as “slaves of the state” who thus lacked all civil rights. *Id.* Prisoners started to achieve modern constitutional status when it was found that the writ of habeas corpus was could be used to challenge conditions of confinement. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944). *See also Ruffin v. Commonwealth*, 62 Va. 790 (1871).

97. *See supra* note 10 (explaining “kangaroo courts”).

98. *Bray*, 729 N.E.2d 359, 362. The court referred specifically to Ohio Revised Code § 2967.11 (C), (D) and (E). *Id.*

for that crime.⁹⁹

The Court also emphasized that the reason the three branches are separate and balanced is to protect the people, not to protect the three branches of government.¹⁰⁰ When the Court concluded that the bad time statute was unconstitutional, it protected the constitutional rights of prisoners by eliminating the Rules Infraction Boards' right to impose a bad time sentence, a procedure that embodied the theory of "kangaroo courts."¹⁰¹

A. Due Process

"Due process will not be completely instilled in the penal process until constitutionally vague and uncertain prison regulations are eliminated."¹⁰² The Due Process Clause of the Fourteenth Amendment of the United States Constitution reads in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."¹⁰³ The Due Process Clause provides a number of protections to United States citizens. These protections include a judicial trial providing a presumption of innocence,¹⁰⁴ proof of guilt beyond a reasonable doubt,¹⁰⁵ the right to confrontation,¹⁰⁶ the right of compulsory process,¹⁰⁷ the right to effective assistance of counsel,¹⁰⁸ the right to a

99. *Id.*

100. *Id.*

101. *Id.* The court held that the disciplinary hearings pursuant to the bad time statute were not less than the executive branch [rules infraction board] acting as judge, prosecutor and jury. *Id.*

102. David A. Sabot, *Judicial Limitations upon Discretionary Authority in the Penal Process*, 8 CAL. W. L. REV. 505, 519 (1972).

103. U.S. CONST. amend. XIV, § 1. See also *State v. Spikes*, 717 N.E.2d 386, 389-90 (Ohio Ct. App. 11th 3d 1998).

104. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (holding that a person accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial).

105. *In re Winship*, 397 U.S. 358, 363 (1970) (holding that the reasonable doubt standard plays a vital role in the American scheme of criminal procedure, and is a prime instrument for reducing the risk of convictions resting on factual error).

106. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (holding that the Confrontation Clause guarantees a defendant a right to a face-to-face meeting with the witnesses appearing before the trier of fact).

107. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (holding that the Sixth Amendment right applies in state as well as federal prosecutions).

108. U.S. CONST. amend VI; *Strickland v. Washington*, 466 U.S. 668, 680 (1984) (holding that the Sixth Amendment accords criminal defendants a right to counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances).

jury trial,¹⁰⁹ and the right to a “fair trial in a fair tribunal.”¹¹⁰

In the prison context, decisions made by institutional supervisors regarding particular individuals are adjudications in which the theory of procedural due process applies.¹¹¹ More specifically, when the state seeks to add time onto an inmate’s determinate sentence, a number of procedural and substantive rights should be afforded to the inmate to ensure the protection of his life and liberty under the Due Process Clause.¹¹²

In the present case, Bray argued that the bad time penalty called for a new term of incarceration, which constituted a new criminal prosecution in which all the protections of procedural Due Process should apply.¹¹³ Because the purpose of the bad time statute is to punish,¹¹⁴ both the Fifth and Sixth Amendments of the United States Constitution mandate that punishment cannot be imposed without a prior criminal trial and all of the due process rights that go along with it.¹¹⁵

109. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that a trial by jury in criminal cases is fundamental to the American scheme of justice).

110. *In re Murchison*, 349 U.S. 133, 136 (1955) (holding that a fair tribunal is a basic requirement of due process).

111. Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1172 (1984). This article proposes an adoption of a general-specific distinction between rule making and adjudication as the required limit on the scope of the Due Process Clause. *Id.* at 1179. *See also* *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968). In *Bishop* the court held that a previous criminal record has been referred to as one of the factors a state may take into consideration in determining the qualifications of voters. *Id.* However, a prisoner of the state does not lose all his/her civil rights during and because of his/her incarceration. *Id.* In particular, the court stated that prisoners continue to be protected by the due process and equal protection clauses which “follow him through the prison doors.” *Id.* at 576.

112. *See* Philip W. Sbaratta, Sandin v. Conner: *The Supreme Court’s Narrowing of Prisoners’ Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 788 (1996). This note concluded that the court stands as the only true protector of a prisoner “against [the] arbitrary action of government,” and the court’s failure to accept its role of defining the scope of the due process clause is tantamount to refusing its chief duty as interpreter of the Constitution. *Id.*

113. *Vitek v. Jones*, 445 U.S. 480 (1980). In *Vitek*, the Court concluded that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause, “as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed on him.” *Id.* at 493 (emphasis added). *See also* Appellant’s Brief at 2, 12, *Bray*, 729 N.E.2d 359 (No. CA98-06-068).

114. *See supra* notes 51-59 and accompanying text.

115. The Fifth Amendment of the United States Constitution states in pertinent part, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law...” U.S. CONST. amend. V. The Sixth Amendment of the United States Constitution states in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State... and to be informed of the nature and case of the accusation;

B. Due Process Violations in the “Bad Time” Statute

The bad time statute violates an inmate’s due process rights in four ways: (1) it is unlikely that there is any presumption of innocence; (2) the standard of proof is a lower standard than that guaranteed by the Due Process Clause; (3) it denies an inmate the right to counsel; and (4) the right to a fair trial in a fair tribunal is abridged.

First, a question arises of whether a trial conducted by disciplinary tribunals within the prison walls provides an inmate with a presumption of innocence.¹¹⁶ This seems highly unlikely. The guilt of charged prisoners is usually a foregone conclusion, as the real function of the disciplinary hearings is to arrive at an appropriate sanction.¹¹⁷ Moreover, the disciplinary tribunals face obvious pressure to resolve a dispute in favor of the institution.¹¹⁸ Thus, it appears that an inmate must abandon his right to a presumption of innocence when standing before a disciplinary tribunal, which clearly violates his due process

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U.S. CONST. amend. VI.

116. Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (explaining that “the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law,” citing *Coffin v. United States* which traced the history of the presumption from Deuteronomy through Roman law, English Common law, and the common law of the United States).

117. Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L. CRIMINOLOGY POLICE SCI. 200, 212-18 (1972) (explaining that when the Center examined disciplinary hearings at a Rhode Island prison, researchers found little correlation between the seriousness of the infraction and the severity of punishment implemented; that demographic characteristics and prior disciplinary violations did not affect the choice of penalty, and; that bias, personal knowledge about the violator, and security level may have influenced the choice of sanctions).

118. *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985). In *Cleavinger*, the Court stated that “it is the old situational problem of the relationship between the keeper and the kept, a relationship that is hardly conducive to a truly adjudicatory performance.” *Id.* See also Robertson, *Impartiality*, *supra* note 8, at 334-35. Robertson suggests that to counter the deficiencies of the “insider” model of adjudication, “outsiders” are needed to decide major disciplinary charges. *Id.* Robertson also suggests that to ensure the neutrality and independence of adjudicators, departments of corrections should follow four necessary and sufficient conditions for impartiality: (1) adjudicators must be sufficiently independent of the warden and other high level correctional administrators to prevent command influence; (2) adjudicators must be well versed in the dynamics of prison life; (3) adjudicators must be knowledgeable of due process safeguards and committed to impartiality, and; (4) adjudicators should be mindful that non-adjudicative tasks assigned to “outsiders” can impart the very institutional bias and institutional knowledge that is so damaging to impartiality, thus their involvement in the institution should be limited to deciding disciplinary cases and reviewing those administrative decisions that affect interests affected by the Due Process Clause. *Id.* at 333-34. Robertson also suggests that should the department of corrections fail in this regard, federal courts should stand ready to intervene on behalf of prisoners. *Id.* at 335.

rights.¹¹⁹

Next, the bad time statute states that only clear and convincing evidence is necessary to sustain a violation, rather than proof beyond a reasonable doubt.¹²⁰ This provision is at odds with the burden of proof standard guaranteed by the Due Process Clause, which has been interpreted to require that “no man shall lose his liberty unless the government has borne the burden of . . . convincing the fact finder of his guilt beyond a reasonable doubt.”¹²¹ Thus, an inmate must abandon yet another right afforded to him under the Due Process Clause when standing before a disciplinary tribunal.

Third, while an appointment of counsel is an absolute requirement of due process whenever the proceeding may result in imprisonment, the bad time statute denies an inmate this right.¹²² Although the statute provides an inmate with a member of the staff of the institution to assist him in presenting his defense, legal counsel does not assist the inmate as required by the Sixth Amendment of the United States Constitution and as required by the Supreme Court in *Strickland v. Washington*.¹²³

Fourth, in *In re Murchison*, the United States Supreme Court stated that “it would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.”¹²⁴ However, under the bad time statute, the Rules

119. See *supra* notes 116-18 and accompanying text.

120. See OHIO REV. CODE § 2967.11(D) (West 2000), *supra* note 45.

121. *In re Winship*, 397 U.S. 358, 363 (1970) (holding that the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure, and it aids in reducing the risk of convictions that rest on factual error). See also *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). In *Speiser*, the Court emphasized that there is always a margin of error in litigation which both parties must take into account, and where a criminal defendant has his liberty at stake, the margin of error is reduced by the process of placing the burden of producing a sufficiency of proof on the other party, and of persuading the fact finder at conclusion of the trial of the defendant's guilt beyond a reasonable doubt. *Id.* at 525-26. The court further held that due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the fact finder of the defendant's guilt. *Id.*

122. *Mastin v. Fellerhoff*, 526 F. Supp. 969, 973 (D. Ohio 1981).

123. *Strickland v. Washington*, 466 U.S. 668, 680 (1984). See also Ohio Prison Rule No. 5120-9-091(F). This rule describes the procedure by which the warden must designate at least one staff member to assist inmates in the presentation of his or her defense before the bad time panel of the Rules Infraction Board. *Id.* The rule explains that although the staff member is intended to assist the inmate in presenting his defense, s/he is not intended to or expected to act as an attorney at law or to give legal advice. *Id.* Instead, the staff assistant helps the inmate to: (1) understand the rule violation and the nature of the proceedings; (2) prepare a witness list; (3) frame questions for his own and opposing witnesses, and; (4) state his defense or response to the allegations in coherent language. *Id.*

124. *In re Murchison*, 349 U.S. 133, 137 (1955). In *Murchison*, Michigan law authorized any judge of its courts to act as a one man grand jury. *Id.* at 133. The court faced the question of whether a contempt proceeding complied with the due process requirement of an impartial tribunal

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Infraction Board acts as a grand jury and hears the case.¹²⁵ This procedure directly conflicts with the right of a fair trial in a fair tribunal.¹²⁶ Even more troubling than the situation proposed in *Murchison*, defendant Bray's hearing before the Rules Infraction Board was anything but fair because he was charged with assaulting a prison guard and was then tried by a disciplinary tribunal composed of nothing but prison guards.¹²⁷

Not only does the bad time statute deny an inmate the right to a jury trial, it denies an inmate the right to a *public* jury trial. In *State v. Lane*, the Ohio Supreme Court held that, "[a] trial held within a prison, for an offense committed within that same institution, denies the defendant the right to a public trial which is a fundamental guarantee of both the United States and Ohio Constitutions."¹²⁸ However, under the bad time statute, disciplinary hearings are held within the institution, rather than in a court of law. Thus, it is evident that the disciplinary hearings, in and of themselves, are a violation of the due process right to a jury trial, as well as the right to a fair tribunal.¹²⁹

where the same judge presiding at the contempt hearing had also served as the one man grand jury from which the contempt charges arose. *Id.* The court held that it was a violation of due process for the "judge-grand-jury" to try the defendants. *Id.* at 139. The court reasoned that it would be difficult, if not impossible, for a judge to free himself from the influence of what took place in his secret grand jury session. *Id.* at 138.

125. See generally OHIO REV. CODE. ANN. § 2967.11(C)-(E) (West 2000). See also *Bray*, 729 N.E.2d at 359, 362.

126. *Murchison*, 349 U.S. at 136 (holding that a fair trial in a fair tribunal is a basic requirement of due process and it follows that no man can be judge in his own case and no man is permitted to try cases where he has an interest in the outcome).

127. *Bray*, 729 N.E.2d at 362 (explaining that as part of a prisoner's sentence, the Board may punish a violation by the prisoner, and the "bad time" statute enables the executive branch to prosecute an inmate for a crime, determine whether a crime has been committed, and to impose the sentence).

128. *State v. Lane*, 397 N.E.2d 1338, 1339 (Ohio 1979). In *Lane*, inmates were indicted for escape from a penitentiary. *Id.* at 1339. The trial was to be held within the confines of the penitentiary for reasons of security and convenience. *Id.* At the trial, the inmates' defense of duress was hampered as many of the subpoenaed witnesses, who were also inmates, refused to testify. *Id.* The inmates appealed their convictions as they were deprived their constitutional right to a fair trial, a public trial, and equal protection of the laws. *Id.* The court concluded that holding a trial within a prison for an offense committed within that same institution abridged the constitutional right to a fair trial in three ways: (1) the presumption of innocence which must attach to the criminal defendant is eroded; (2) there is a major interference with the jury's ability to remain impartial; and (3) the right of the defendant to obtain witnesses is chilled. *Id.* at 1340. The court emphasized that the prison environment is laden with a sense of punishment of the guilty within which transmits too great an impression of guilt on the part of the inmate on trial. *Id.* The court also emphasized that a trial within a maximum security penitentiary with twelve-foot high double walls, armed guards and visible barred windows does not allow a jury to maintain the delicate posture of impartiality, a bedrock principle in our judicial system. *Id.* at 1341.

129. See *supra* notes 124-28 and accompanying text. In *re Murchison*, 349 U.S. 133 (1955);

C. Proposed Solutions in the Aftermath of Bray

The legislature has other means to achieve the apparent goal of the bad time statute without violating an inmate's due process rights, or the doctrine of separation of powers.¹³⁰ For instance, the warden may pursue criminal prosecution of inmates who commit violations by proceeding through the court system, rather than through the disciplinary tribunals within the prison.¹³¹ This process ensures that inmates have the benefit of constitutional protections.¹³²

In addition, Ohio could adopt a new statute that contains a limited "good time" penalty.¹³³ For example, good time could be used solely as a disciplinary mechanism, not as an incentive.¹³⁴ This limitation on traditional good time sentencing schemes would still fulfill the main purpose of the bad time statute, which is to punish.¹³⁵ However, this system of good time would not create a new term of incarceration that would give rise to a need for a criminal prosecution, which requires the procedural and substantive safeguards of the Due Process Clause.¹³⁶

Moreover, Ohio could avoid creating a liberty interest by enacting parole board release guidelines rather than enacting a statute.¹³⁷ These

State v. Lane, 397 N.E.2d 1338 (Ohio 1979).

130. See *infra* notes 131-41 and accompanying text.

131. White v. Konteh, No. 99-T-0020, 1999 WL587976 at *9 (Ohio App. 11th Dist. Mar. 23, 1999) (Christley, P.J., concurring) (expressing that there has always been an ability for the warden of a prison to pursue criminal prosecution of inmates explaining that it was proven in the aftermath of the Lucasville riots that such prosecutions are feasible).

132. *Id.* (explaining that this process was proven to be feasible as a result of the numerous prosecutions in the aftermath of the Lucasville riot).

133. See Jacobs *supra* note 26 and accompanying text.

134. Jacobs, *supra* note 26, at 241. Professor Norval Morris suggested this plan for a limited good time penalty although there is no evidence for his conclusion. *Id.* However, Norman Carlson, director of the Federal Bureau of Prisoners suggested that under proper management, one could enforce prison discipline by granting and withholding furloughs, monetary awards, and transfer. *Id.* at 242.

135. See *supra* notes 51-59 and accompanying text. See also White, 1999 WL687976, at *4 (explaining that under Ohio's former statutory scheme, a prisoner could earn "good time" which entitled the prisoner to have a certain number of days subtracted from his minimum or definite sentence, and that "good time" could be revoked as punishment, but it merely meant that the prisoner would be required to serve a greater percentage of the minimum or definite sentence imposed by the trial court, rather than imposing a separate sentence).

136. See *supra* notes 102-15 and accompanying text.

137. Palacios, *supra* note 22, at 614. Palacios argues that guidelines direct and limit discretion, and without guidelines, discretion is freewheeling. *Id.* The author also describes that in her experience as a parole board member, directed discretion is essential to sound decision-making. *Id.* She explains that after hearing a large volume of cases the human mind is incapable of producing consistent, fair decisions and criminals become difficult to distinguish, such that all burglars seem alike so their sentences may not be individualized at all. *Id.* The author also explains that release guidelines should contain a purpose statement that clarifies that a Parole Board "may" release an

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guidelines would not have the effect as has law, and thus would only be used to clarify the board's exercise of discretion.¹³⁸ Such guidelines would provide more flexibility than statutory guidelines because, in the latter instance, it is not necessary to invoke the legislative process to make any changes.¹³⁹

Furthermore, Ohio's correctional facilities still retain the more traditional sanctions in punishing offenders. These sanctions include, but are not limited to, such things as solitary confinement, revocation of special privileges such as entertainment, recreation, and visiting rights, and punishment by requiring the inmate to do extra work within the prison.¹⁴⁰ Any of these sanctions could potentially fulfill the purpose of punishment as provided for in the bad time statute.¹⁴¹

V. CONCLUSION

In *Bray*, the Ohio Supreme Court has taken a step in the right direction, as the very foundation of our state government is the guarantee that no person shall be deprived of rights without due process of law.¹⁴² Courts should recognize that there are existing interests that are so important to a prisoner's individual liberty that the judiciary must protect

inmate on parole, therefore not creating a protected liberty interest. *Id.* at 599, 614. The guidelines should inform inmates as to what information would be relevant for presentation at the hearing, as well as provide a means of accomplishing uniformity, proportionality, and predictability without unduly interfering with the parole board's exercise of discretion. *Id.* at 613. Moreover, the guidelines can require the Board to submit a statement of reasons explaining what rationale drove their decision, which acts as a guard against arbitrary decisions. *Id.*

138. *Id.* at 614. See also *Hall v. Utah Bd. of Pardons*, 806 P.2d 217, 218 (Utah Ct. App. 1991). In *Hall*, the Court explained that the guidelines used by the Board of Pardons did not have the force and effect of law because they were not mandatory standards that must be followed, but are merely guidelines used to clarify the Board's exercise of discretion. *Id.*

139. *Palacios*, *supra* note 22, at 614 (explaining that parole release guidelines require monitoring especially during the time immediately after their adoption, and that there must be an allowance made for departures which should be examined for patterns that suggest that the guidelines need further adjustment).

140. Bruce R. Jacob & K. M. Sharma, *Disciplinary and Punitive Transfer Decisions and Due Process Values in the American Correctional System*, 12 STETSON L. REV. 1, 11 (1982). Jacobs, *supra* note 26, at 258. Jacobs expresses that after years of prison research he found that disciplinary segregation is perceived by prisoners to be the most important intra-prison punishment. *Id.* Jacobs believes that this may be so because of the visible and symbolic character of hauling a prisoner off to segregation which is a public act that reverberates throughout the prison community. *Id.* In addition, segregation has an immediate and negative effect on the inmate who violates a rule. *Id.* Jacobs distinguishes segregation from the revocation of good time, which he describes as a mere paper punishment. *Id.*

141. See *supra* note 140 and accompanying text.

142. *State v. Spikes*, 717 N.E.2d 386, 389-90 (Ohio Ct. App. 11th 1998).

in the interest of the Due Process Clause.¹⁴³

Although the Ohio Supreme Court based its decision on the bad time statute's violation of the Separation of Powers Doctrine, the same decision could have been reached through an inmate's constitutional right to due process. A neutral magistrate is indispensable, at whatever level of the judiciary, as he stands between the accused who wants to be free and the law enforcement officials whose function is to facilitate the process of keeping them behind bars.¹⁴⁴

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143. See Sbaratta, *supra* note 112 and accompanying text.

144. *Spikes*, 717 N.E.2d at 391. See also *supra* note 118 and accompanying text.